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of the case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF THE INVOLUNTARY )  
TERMINATION OF PARENT-CHILD )  
RELATIONSHIP OF R.E., JR., MINOR CHILD )  
AND HIS MOTHER, TONIA CLARK )  
AND HIS FATHER R.E.,SR, )

R.E., SR., )

Appellant, )

vs. )

MARION COUNTY OFFICE OF FAMILY )  
AND CHILDREN AND CHILD ADVOCATES, )  
INC., )

Appellees. )

No. 49A02-0604-JV-300

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Deborah Shook, Commissioner  
Cause No. 49D09-0504-JT-13942

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October 12, 2006

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Ronald Elsbury, Sr., appeals the termination of his parental rights. We affirm.

### **Issue**

Elsbury raises one issue, which we restate as whether his absence from the second day of the termination hearing denied him due process.

### **Facts**

R.E. was born on August 1, 2003, to Tonia Clark and Elsbury. On July 8, 2004, R.E. was alleged to be a child in need of services (“CHINS”) and was later found to be a CHINS. On April 13, 2005, the Department of Child Services (“DCS”) filed a petition to terminate Clark’s and Elsbury’s parental rights. On January 3, 2006, a hearing was held on the petition to terminate their parental rights.<sup>1</sup> Elsbury appeared, was represented by counsel, and testified at the hearing. The hearing was scheduled to conclude on February 8, 2006. That hearing was continued, and a status hearing, which Elsbury did not attend, was held on February 16, 2006.

On March 23, 2006, the trial court conducted the conclusion of the termination hearing. Elsbury did not attend this hearing. Elsbury’s attorney moved to withdraw his appearance based on Elsbury’s failures to attend the hearings and his inability to provide a meaningful defense. Elsbury’s attorney explained that he had spoken with Clark in attempt to locate Elsbury but was unsuccessful. The DCS stated it had not heard from Elsbury since the first termination hearing. Reasoning that Elsbury had already testified,

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<sup>1</sup> On January 23, 2006, Clark voluntarily consented to the adoption of the R.E.

the trial court denied Elsbury's attorney's motion to withdraw and heard evidence from the case manager and the guardian ad litem.

On March 30, 2006, the trial court issued an order terminating Elsbury's parental rights. Elsbury now appeals.

### **Analysis**

Elsbury argues that he was denied due process when the trial court allowed the hearing on the petition to terminate to continue in his absence. "The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding." Lawson v. Marion County Office of Family & Children, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005). When the DCS seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process. Id. at 580. Due process is described as the opportunity to be heard at a meaningful time and in a meaningful manner. Id. Due process turns on the balancing of three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. Id. "The balancing of these factors recognizes that although due process is not dependent on the underlying facts of the particular case, it is nevertheless 'flexible and calls for such procedural protections as the particular situation demands.'" Id. (citations omitted).

As we have previously observed in termination cases, the private interests and the countervailing governmental interests are substantial. Id.

In particular, the action concerns a parent's interest in the care, custody, and control of his children, which has been recognized as one of the most valued relationships in our culture. Moreover, it is well settled that the right to raise one's children is an essential, basic right that is more precious than property rights. As such, a parent's interest in the accuracy and justice of the decision is commanding. A parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship. On the other hand, the State's *parens patriae* interest in protecting the welfare of the children involved is also significant. Delays in the adjudication of a case impose significant costs upon the functions of the government as well as an intangible cost to the lives of the children involved.

Id. (citations omitted).

We also must consider the risk of error created by challenged procedure. In Lawson, we concluded that the risk of error in conducting a hearing where evidence against the father was presented after his attorney had been excused from the proceeding was substantial. Id. We reasoned that because the father was unable to cross-examine some of the witnesses and unable to object to key exhibits admitted into evidence, the trial court may not have had an accurate picture of the evidence before making its decision. Id.

The facts of this case, however, are much different than those in Lawson. Here, Elsbury was present and testified on the first day of the hearing. Moreover, Elsbury's attorney was present throughout the entire proceeding despite Elsbury's absence on the second day of the hearing. On the first day of the hearing, Elsbury's attorney objected to evidence and cross-examined witnesses. Although Elsbury's attorney did not cross-examine the case manager and the guardian ad litem, the two witnesses who testified on

the second day of the hearing,<sup>2</sup> Elsbury does not point to specific harm that resulted in the failure to cross-examine these witnesses or what evidence should have been presented in his defense. Given Elsbury's own testimony regarding his extensive criminal history, drug use, unstable housing situation, unsteady employment history, and failure to complete services provided by the DCS and his testimony that he had been a "piss-poor excuse for a father," the risk of error was not high and Elsbury was not denied due process. Tr. p. 44.

Elsbury also acknowledges that he did not have a constitutional right to be present at the termination hearing. See In re C.C., 788 N.E.2d 847, 853 (Ind. Ct. App. 2003), trans. denied, trans. denied. He argues, however, that because he was not incarcerated at the time, he had a right to be present.<sup>3</sup> To the extent that a parent who is not incarcerated

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<sup>2</sup> Although the DCS and the caseworker discussed the contents of Exhibit 11 on the second day of the hearing it does not appear that it was actually admitted into evidence as it is not included in the volume of exhibits. No exhibits were offered into evidence on the second day of the hearing.

<sup>3</sup> In support of this argument, Elsbury contends:

The significance of the deprivation occasioned by terminating parental rights has been recognized in providing parents with the right to representation in termination proceedings. Related to that, this Court has adopted the standard used in criminal cases to evaluate the effectiveness of counsel in termination proceedings, recognizing termination proceedings are comparable to criminal proceedings in some respects.

Appellant's Br. p. 5. Although the DCS responds to this argument with an in-depth analysis of whether Elsbury received effective assistance of counsel, we believe Elsbury's assertions are included in his brief for the purpose of establishing that he had a right to be present at the hearing and not necessarily that his attorney was ineffective. Even if we are misconstruing the nature of Elsbury's argument, he provides no specific standard of reviewing such ineffective assistance of counsel claims and no analysis of counsel's performance or resulting prejudice under this standard. See J.T. v. Marion County Office of Family & Children, 740 N.E.2d 1261, 1265 (Ind. Ct. App. 2000) ("Thus, in order to establish ineffective assistance of counsel, a party must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that the substandard performance was so

may not be prohibited from attending a hearing regarding the termination of his or her parental rights, we agree.

Elsbury, however, does not provide us with any explanation as to why he did not attend the second day of the hearing other than to state that nothing in the record supports the trial court's finding that he received notice of the second hearing date. Although the record does not confirm that Elsbury actually received notice of the hearing, both his attorney and the DCS indicated that Elsbury had not maintained contact with them. On the first day of the hearing, Elsbury testified that he was temporarily living in an RV on his employer's property and that he planned to move into an apartment in two weeks. On the second day of the hearing, the case manager testified that she did not have a current address for Elsbury. Further, Elsbury was well aware of the pending termination proceeding, as evidenced by his presence and testimony on the first day of the hearing, but did not maintain contact with his attorney or the appropriate authorities or apprise them of his current address. Elsbury may not now claim that his due process rights were violated because he did not attend the second day of the hearing.

### **Conclusion**

Elsbury, who attended and testified at the first day of a two-day hearing and was represented by counsel on both days, was not denied due process when he was absent from the second day of the hearing. We affirm.

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prejudicial as to have deprived him of a fair adjudication.”), trans. denied. This issue is waived. See Ind. Appellate Rule 46(A)(8); Maggert v. Call, 817 N.E.2d 649, 651 (Ind. Ct. App. 2004).

Affirmed.

SULLIVAN, J., and ROBB, J., concurs.